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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Barney J. Auman
Serial No.: 09/895,612
Filed: 06/29/2001
For: Process for Manufacturing a Capital for an Architectural Column
Confirmation No.: 6798
Group Art Unit: 1732
Examiner: Allan R. Kuhns
Customer No.: 31198
Attorney Docket No.: PAUMAB-CT

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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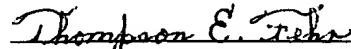
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Date of Deposit: October 22, 2004

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Transmittal of Appeal Brief

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Thompson E. Fehr



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TRANSMITTAL OF APPEAL BRIEF (PATENT APPLICATION-37 CFR 41.37)

1. Transmitted herewith in triplicate is the APPEAL BRIEF in this application with respect to the Notice of Appeal filed on April 22, 2004.

2. STATUS OF APPLICANT

This application is on behalf of a small entity.

The verified statement of small entity status has already been filed.

3. FEE FOR FILING APPEAL BRIEF

Pursuant to 37 CFR 41.20(b)(2) the fee for filing the Appeal Brief is \$170.00.

Appeal Brief fee due \$170.00.

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4. EXTENSION OF TERM

The proceedings herein are for a patent application, and the provisions of 37 CFR 1.136 apply.

Applicant petitions for an extension of time under 37 CFR 1.136 (fees: 37 CFR 1.17(a)(1)-(5)) for a total of four months. The requisite fee for a small entity is \$765.00.

Fee \$765.00

5. TOTAL FEE DUE

The total fee due is

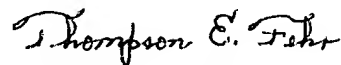
Appeal brief fee \$170.00

Extension fee \$765.00

TOTAL FEE DUE \$935.00

6. Attached is a check in the sum of \$935.00.

DATED this 22nd day of October, 2004.



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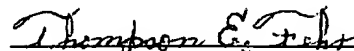
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Date of Deposit: October 22, 2004

I hereby certify that the following attached

Appellant's Brief

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APPELLANT'S BRIEF (37 CFR 41.37)

This brief is in furtherance of the Notice of Appeal filed in this case on April 22, 2004.

The fees required under § 41.20 and any required petition for extension of time for filing this brief and fees therefor are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

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This brief contains the following items, under headings of the same name and in the order given:

REAL PARTY IN INTEREST
RELATED APPEALS AND INTERFERENCES
STATUS OF CLAIMS
STATUS OF AMENDMENTS
SUMMARY OF CLAIMED SUBJECT MATTER
GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL
ARGUMENT
 Claims 1 through 24
 Statutory Double-patenting Rejection
 Claim 25
 35 U.S.C. § 112
CLAIMS APPENDIX

The final page of this brief bears the attorney's signature.

REAL PARTY IN INTEREST

The real party in interest is Barney J. Auman.

RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to Appellants or Appellants' legal representative which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

Claims 1 through 24 were in the original Application and have been rejected.

Claim 25 resulted from an amendment and has been rejected.

The claims being appealed are claims 1 through 25.

STATUS OF AMENDMENTS

No amendment has been filed subsequent to the final rejection.

SUMMARY OF CLAIMED SUBJECT MATTER

Lines 4 through 7 on page 3 of the present application indicate:

This invention relates to a process for manufacturing a capital for an architectural column using rotation of a mold into which a foam and an elastomer have been placed. As used throughout this document, the term "elastomer" is meant also to include a "resin"; and the term "foam" includes any liquid that will expand and create a lightweight filler.

As explained on lines 2 through 9 of page 4 in the application as originally filed:

Elastomers are placed inside a mold that is rotated about three axes to assure that the elastomers cover the entire inside surface of the mold. Several different coatings of elastomers are utilized.

Elastomers are utilized to give strength to the capital. However, to minimize weight while reducing the tendency of a hollow capital to warp, the space inside the elastomers is filled with foam.

Rotation of the mold can be accomplished in any manner but is preferably done with a machine.

Furthermore, lines 27 through 29 on page 6 of the present application explain:

Then an elastomer is introduced into the mold 1 and the mold 1 is rotated about multiple different axes, preferably but not necessarily, two orthogonal axes. Introduction of the elastomer may occur either before or after rotation of the mold 1 commences.

Independent claim 1 applies to rotation about “multiple different axes” by simply using the unmodified term “rotation.”

Independent claim 25 explicitly covers “rotation of the mold about two orthogonal axes.”

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The Examiner has rejected claims 1 through 24 on the grounds of statutory double patenting in view of United States patent no. 6,579,481.

Claim 25 has been rejected by the Examiner under 35 U.S.C. § 112 as not being “. . . described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention” because “[t]he aspect in claim 25 of ‘commencing rotation of the mold about two orthogonal axes either before or after introduction of the elastomer lacks support in the disclosure as filed.’”

ARGUMENT

Claims 1 through 24

Statutory Double-patenting Rejection

On page 2 of his Office Action of October 22, 2003, the Examiner has said:

A rejection based on double patenting of the “same invention” type finds its support in the language of 35 U.S.C. 101 which states that “whoever invents or discovers any new and useful process ... may obtain a patent therefor ...” (Emphasis added). Thus, the term “same invention,” in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

Appellant agrees that the same words are used in claims 1-24 of both United States patent no. 6,579,481 and the current patent application but respectfully suggests that the word “rotate” has different meanings in the two applications.

Appellant also concurs that claims in a patent application are interpreted broadly, in accordance with MPEP § 2111:

During patent examination, the pending claims must be "given *>their< broadest reasonable interpretation consistent with the specification." >*In re Hyatt*, 211 F.3d 1367, 1372, 54 USPQ2d 1664, 1667 (Fed. Cir. 2000).< Applicant always has the opportunity to amend the claims during prosecution, and broad interpretation by the examiner reduces the possibility that the claim, once issued, will be interpreted more broadly than is justified. *In re Prater*, 415 F.2d 1393, 1404-05, 162 USPQ 541, 550-51 (CCPA 1969) . . .

The broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1359, 49 USPQ2d 1464, 1468 (Fed. Cir. 1999)

And MPEP § 2111.01 further provides:

While the claims of issued patents are interpreted in light of the specification, prosecution history, prior art and other claims, this is not the mode of claim interpretation to be applied during examination. During examination, the claims must be interpreted as broadly as their terms reasonably allow. >*In re American Academy of Science Tech Center*, ___ F.3d ___, 2004 WL 1067528

(Fed. Cir. May 13, 2004)(The USPTO uses a different standard for construing claims than that used by district courts; during examination the USPTO must give claims their broadest reasonable interpretation.).

...
The ordinary and customary meaning of a term may be evidenced by a variety of sources, *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298, 67 USPQ2d 1132, 1136 (Fed. Cir. 2003), including: the claims themselves, *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999); dictionaries and treatises, *Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202, 64 USPQ2d 1812, 1818 (Fed. Cir. 2002); and the written description, the drawings, and the prosecution history, see, e.g., *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1324, 57 USPQ2d 1889, 1894 (Fed. Cir. 2001). If extrinsic reference sources, such as dictionaries, evidence more than one definition for the term, the intrinsic record must be consulted to identify which of the different possible definitions is most consistent with applicant's use of the terms. *Brookhill-Wilk 1*, 334 F. 3d at 1300, 67 USPQ2d at 1137; see also *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250, 48 USPQ2d 1117, 1122 (Fed. Cir. 1998) ("Where there are several common meanings for a claim term, the patent disclosure serves to point away from the improper meanings and toward the proper meanings."). If more than one extrinsic definition is consistent with the use of the words in the intrinsic record, the claim terms may be construed to encompass all consistent meanings. *Tex. Digital*, 308 F.3d at 1203, 64 USPQ2d at 1819. See also *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342, 60 USPQ2d 1851, 1854 (Fed. Cir. 2001)(explaining the court's analytical process for determining the meaning of disputed claim terms); *Toro Co. v. White Consol. Indus., Inc.*, 199 F.3d 1295, 1299, 53 USPQ2d 1065, 1067 (Fed. Cir. 1999)("[W]ords in patent claims are given their ordinary meaning in the usage of the field of the invention, unless the text of the patent makes clear that a word was used with a special meaning."). **>Compare *MSM Investments Co. v. Carolwood Corp.*, 259 F.3d 1335, 1339-40, 59 USPQ2d 1856, 1859-60 (Fed. Cir. 2001) (Claims directed to a method of feeding an animal a beneficial amount of methylsulfonylmethane (MSM) to enhance the animal's diet were held anticipated by prior oral administration of MSM to human patients to relieve pain. Although the ordinary meaning of "feeding" is limited to provision of food or nourishment, the broad definition of "food" in the written description warranted finding that the claimed method encompasses the use of MSM for both nutritional and pharmacological purposes.); and *Rapoport v. Dement*, 254 F.3d 1053, 1059-60, 59 USPQ2d 1215, 1219-20 (Fed. Cir. 2001) (Both intrinsic evidence and the plain meaning of the term "method for treatment of sleep apneas" supported construction of the term as being limited to treatment of the underlying sleep apnea disorder itself, and not encompassing treatment of anxiety and other secondary symptoms related to sleep apnea.).

Furthermore, the specification must be reviewed to determine "whether the presumption of ordinary and customary meaning is rebutted." *Tex. Digital*,

308 F.3d at 1204. "The presumption will be overcome where the patentee, acting as his own lexicographer, has set forth a definition for the term different from its ordinary and customary meaning or where the patentee has disavowed or disclaimed scope of coverage, by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope." *International Rectifier Corp. v. IXYS Corp.*, 361 F.3d 1363, 1368, 70 USPQ2d 1209, 1214 (Fed. Cir. 2004).

Therefore, while the Examiner is correct that the claims in the present patent application should be interpreted broadly, the claims in issued patent no. 6,579,481 should be read in view of the specification.

Lines 27 through 31 in column 2 of issued patent no. 6,579,481 provide:

Then an elastomer is introduced into the mold 1 and the mold 1 is rotated about three different axes, preferably but not necessarily, three orthogonal axes. Introduction of the elastomer may occur either before or after rotation of the mold 1 commences.

On the contrary, lines 27 through 29 on page 6 of the present application explain:

Then an elastomer is introduced into the mold 1 and the mold 1 is rotated about multiple different axes, preferably but not necessarily, two orthogonal axes. Introduction of the elastomer may occur either before or after rotation of the mold 1 commences.

Thus, the present application uses "rotation" to mean rotation about multiple different axes whereas "rotation" in issued patent no. 6,579,481 means rotation about three different axes.

Consequently, Appellant respectfully submits that the claims are not identical.

Appellant would, however, if suggested by the Board, be pleased to prepare a terminal disclaimer.

Claim 25

35 U.S.C. § 112

On pages 2 and 3 of his Office Action of October 22, 2003, the Examiner has asserted:

The amendment filed August 5, 2003 is objected to under 35 U.S.C. 132 because it introduces new matter into the disclosure. 35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the aspect beginning at line 2 of page 4 that “(e)lastomers are placed inside a mold that is rotated about multiple different axes, preferably but not necessarily, two orthogonal axes to assure that the elastomers cover the entire inside surface of the mold”.

Applicant is required to cancel the new matter in the reply to this Office Action.

Claim 25 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The aspect in claim 25 of “commencing rotation of the mold about orthogonal axes either before or after introduction of the elastomer” lacks support in the disclosure as filed.

The Summary of the Invention was modified as follows:

Elastomers are placed inside a mold that is rotated about multiple different axes, preferably but not necessarily, two orthogonal ~~three~~ axes to assure that the elastomers cover the entire inside surface of the mold. Several different coatings of elastomers are utilized.

And claim 25 states, in pertinent part, “commencing rotation of the mold about two orthogonal axes either before or after introduction of the elastomer;” and, as already observed, the application, in lines 27 through 29 on page 6, originally and presently states:

Then an elastomer is introduced into the mold 1 and the mold 1 is rotated about multiple different axes, preferably but not necessarily, two orthogonal axes. Introduction of the elastomer may occur either before or after rotation of the mold 1 commences.

Therefore, Appellant respectfully suggests that no new matter has been introduced; and 35 U.S.C. § 112 has not been violated.

Appellant respectfully requests that the Board reverse the decision of the Examiner and rule that claims 1 through 25 are allowable, at least if a terminal disclaimer is filed, since they do not involve statutory double patenting or the impermissible introduction of new matter.

CLAIMS APPENDIX

1 Claim 1. A process for manufacturing a capital for an architectural column, which
2 comprises:

3 lightly coating the inside of a mold having a first opening and one or more other
4 openings with mold release;

5 placing the first opening of the mold upon a surface that has been coated with
6 mold release;

7 either before or after placing the first opening of the mold upon a surface that has
8 been coated with mold release, positioning a plug where the first opening is or will be
9 located on the surface;

10 through another opening in the mold pouring foam around the plug to a level that
11 is less than the thickness of the mold;

12 after the foam has hardened, removing the mold from the surface;

13 securely covering all other openings in the mold;

14 introducing an elastomer into the mold;

15 commencing rotation of the mold either before or after introduction of the
16 elastomer;

17 replacing the plug in the first opening;

18 after the coating formed by the prior introduction of the elastomer has become
19 tacky but before such coating has become firm, the introduction of the elastomer is
20 repeated one or more times; and

21 after the final coating formed by the introduction of the elastomer has become
22 tacky but not firm, foam is introduced into the mold.

1 Claim 2. The process for manufacturing a capital for an architectural column as recited
2 in claim 1, further comprising:

3 either before or after the mold release applied to the inside of the mold has dried,
4 coating such mold release with a clear aerosol spray enamel.

1 Claim 3. The process for manufacturing a capital for an architectural column as recited
2 in claim 2, wherein:

3 the plug is composed of silicon rubber.

1 Claim 4. The process for manufacturing a capital for an architectural column as recited
2 in claim 3, further comprising:

3 periodically removing the plug to reduce pressure as the foam solidifies.

1 Claim 5. The process for manufacturing a capital for an architectural column as recited
2 in claim 4, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 6. The process for manufacturing a capital for an architectural column as recited
2 in claim 3, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 7. The process for manufacturing a capital for an architectural column as recited
2 in claim 2, further comprising:

3 before pouring foam around the plug, coating the plug with mold release.

1 Claim 8. The process for manufacturing a capital for an architectural column as recited
2 in claim 7, further comprising:

3 periodically removing the plug to reduce pressure as the foam solidifies.

1 Claim 9. The process for manufacturing a capital for an architectural column as recited
2 in claim 8, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;
6 and
7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 10. The process for manufacturing a capital for an architectural column as recited
2 in claim 7, further comprising:

3 once the foam has ceased to expand, stopping rotation;
4 removing the plug;
5 orienting the mold to place the first opening near the highest point of the mold;
6 and
7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 11. The process for manufacturing a capital for an architectural column as recited
2 in claim 2, further comprising:

3 periodically removing the plug to reduce pressure as the foam solidifies.

1 Claim 12. The process for manufacturing a capital for an architectural column as recited
2 in claim 11, further comprising:

3 once the foam has ceased to expand, stopping rotation;
4 removing the plug;
5 orienting the mold to place the first opening near the highest point of the mold;
6 and
7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 13. The process for manufacturing a capital for an architectural column as recited
2 in claim 1, wherein:

3 the plug is composed of silicon rubber.

1 Claim 14. The process for manufacturing a capital for an architectural column as recited
2 in claim 13, further comprising:

3 periodically removing the plug to reduce pressure as the foam solidifies.

1 Claim 15. The process for manufacturing a capital for an architectural column as recited
2 in claim 14, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 16. The process for manufacturing a capital for an architectural column as recited
2 in claim 13, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 17. The process for manufacturing a capital for an architectural column as recited
2 in claim 1, further comprising:

3 before pouring foam around the plug, coating the plug with mold release.

1 Claim 18. The process for manufacturing a capital for an architectural column as recited
2 in claim 17, further comprising:

3 periodically removing the plug to reduce pressure as the foam solidifies.

1 Claim 19. The process for manufacturing a capital for an architectural column as recited
2 in claim 18, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 20. The process for manufacturing a capital for an architectural column as recited
2 in claim 17, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 21. The process for manufacturing a capital for an architectural column as recited
2 in claim 1, further comprising:

3 periodically removing the plug to reduce pressure as the foam solidifies.

1 Claim 22. The process for manufacturing a capital for an architectural column as recited
2 in claim 21, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 23. The process for manufacturing a capital for an architectural column as recited
2 in claim 1, further comprising:

3 once the foam has ceased to expand, stopping rotation;

4 removing the plug;

5 orienting the mold to place the first opening near the highest point of the mold;

6 and

7 introducing the requisite amount of foam necessary to fill any remaining void
8 within the mold.

1 Claim 24. The process for manufacturing a capital for an architectural column as recited
2 in claim 1, further comprising:

3 after the foam around the plug has hardened and the plug has been removed,
4 removing any hardened foam that was above the plug.

1 Claim 25. A process for manufacturing a capital for an architectural column, which
2 comprises:

3 lightly coating the inside of a mold having a first opening and one or more other
4 openings with mold release;

5 placing the first opening of the mold upon a surface that has been coated with
6 mold release;

7 either before or after placing the first opening of the mold upon a surface that has
8 been coated with mold release, positioning a plug where the first opening is or will be
9 located on the surface;

10 through another opening in the mold pouring foam around the plug to a level that
11 is less than the thickness of the mold;

12 after the foam has hardened, removing the mold from the surface;

13 securely covering all other openings in the mold;

14 introducing an elastomer into the mold;

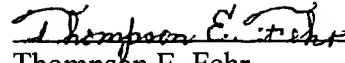
15 commencing rotation of the mold about two orthogonal axes either before or after
16 introduction of the elastomer;

17 replacing the plug in the first opening;

18 after the coating formed by the prior introduction of the elastomer has become
19 tacky but before such coating has become firm, the introduction of the elastomer is
20 repeated one or more times; and

21 after the final coating formed by the introduction of the elastomer has become
22 tacky but not firm, foam is introduced into the mold.

DATED this 22nd day of October, 2004.

A handwritten signature in cursive script, reading "Thompson E. Fehr", is written over a horizontal line.

Thompson E. Fehr
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